

LEE AH LAN

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v.

LEE KIM LAN CONSTRUCTION INDUSTRIES
SDN BHD & ANOR

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HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: 22-107-1996]
19 DECEMBER 2002

CIVIL PROCEDURE: Amendment - Defence - Whether application made mala fide - Whether fact that proposed amendments may support plaintiff's case or prejudice co-defendant's defence shows lack of bona fides - Whether delay in making application explained - Whether proposed amendments more reflective of applicant's instructions to counsel - Whether prejudice to co-defendant can be compensated by costs - Rules of the High Court 1980, O. 20 r. 5

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CIVIL PROCEDURE: Pleadings - Amendment of defence - Deletion of counterclaim - Whether application made mala fide - Whether fact that proposed amendments may support plaintiff's case or prejudice co-defendant's defence shows lack of bona fides - Whether delay in making application explained - Whether proposed amendments more reflective of applicant's instructions to counsel - Whether prejudice to co-defendant can be compensated by costs - Rules of the High Court 1980, O. 20 r. 5

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This was an application by the 2nd defendant, pursuant to O. 20 r. 5 Rules of the High Court 1980, for leave to amend her defence and delete her counterclaim against the plaintiff on the ground that the proposed amendments would: (i) enable the court to determine the real questions in controversy as between the plaintiff and the 2nd defendant; (ii) accurately reflect the 2nd defendant's rights and position in the proceedings; and (iii) correct all the defects in the 2nd defendant's pleadings. The proposed amendments were not objected to by the plaintiff, but the 1st defendant opposed them principally on the ground of *mala fide*. It was argued that the proposed amendments would support the plaintiff's case and prejudice the 1st defendant's defence.

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a Held:

b [1] The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice will or will not result: (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments will in effect turn the suit from one character into a suit of another and inconsistent character. (*Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] CLJ (Rep) 428, per Mohd Azmi FJ.) (pp 589 c-e, 590 f-h & 591 a)

c [2] The fact that the proposed amendments might not fit into the scheme of the 1st defendant's pleadings or coincide with its defence did not cast suspicions on the bona fides of the 2nd defendant's application. The 2nd defendant was perfectly entitled, as a party to the proceedings, to arrange or conduct her defence and pleadings in the best possible way, and with the utmost priority, to serve her interests without any regard to the interests of the other parties. (p 591 b-c)

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e [3] The four-year delay in filing the application to amend her defence had been reasonably explained by the 2nd defendant, especially with regard to the issue of her capacity as a party or a mere witness to the proceedings. The proposed amendments would also be more reflective of the 2nd defendant's instructions to her counsel, and any prejudice to the 1st defendant could also be compensated by an award of costs. (pp 591 f-h & 592 a)

f [Second defendant's application allowed.]

Case(s) referred to:

Angel Cake House Sdn Bhd & Ors v. Bandaraya Development Bhd [2001] 1 CLJ 746 HC (**refd**)

g *Gurbachan Singh & Ors v. Tetuan Muthu & Lee & Anor* [2001] 2 CLJ 173 HC (**refd**)

Kam Hoy Trading v. Kam Fatt Tin Mine [1963] MLJ 248 (**refd**)

Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA (**refd**)

Syarikat Ying Mui Sdn Bhd v. Muthusamy Sellapan And Other Appeals [1999] 4 CLJ 651 HC (**refd**)

h *Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703 CA (**refd**)

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Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC (*fol*) a
Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai [1981] 2 MLJ 21 FC (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 5(1) b

For the 1st defendant - S Letchumanan; M/s Letchu Suppiah & Co

For the 2nd defendant - Liza Chan & Co; M/s Liza Chan & Co

Reported by Gan Peng Chiang

JUDGMENT c

Low Hop Bing J:

Application

This is the second defendant's application in encl. (110) made under O. 20 r. 5 of the Rules of the High Court 1980 for leave to amend the defence and counterclaim ("the application"). d

The effect of the proposed amendment is, first to delete para 5 to para 14 of the second defendant's defence and to substitute thereof the following new paras 12 and 13: e

12. Sehubungan perenggan ketiga puluh tiga tuntutan Plaintiff, Defendan Kedua menegaskan Defendan Kedua akan memberi kebenarannya dengan menandatangani segala dokumen yang diperlukan untuk membahagikan Tanah tersebut asalkan tanah yang dituntut oleh Plaintiff tidak memasuki bahagian tanah Defendan Kedua mengikut perjanjian 1972. f

13. Maka Defendan Kedua memohon, jikalau Mahkamah mulia ini berpendapat Plaintiff adalah tuanpunya benefisial yang sah bagi sub-lot 2, 3, 13 dan 14, Mahkamah yang mulia ini patut memerintahkan Plaintiff menanggung sebahagian kos yang dikenakan mengikut bahagian atau kadar tanahnya untuk penukaran syarat kegunaan Tanah tersebut dan pemecahan bahagian membahagikan Tanah tersebut. g

[My Translation:

12. With regard to para thirty three of the plaintiff's claim, the second defendant avers that the second defendant will give her consent by executing all documents as required for sub-dividing the said land so long as the land claimed by the plaintiff does not encroach upon the second defendant's land pursuant to the 1972 agreement. h

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- a* 13. Therefore the second defendant applies, if this Honourable Court is of the opinion that the plaintiff is the real beneficial owner of sub-lots 2, 3, 13 and 14, that this Honourable Court should order the plaintiff to bear part of the costs to be imposed according to the part or proportion of the land for conversion of the conditions for use of the said land and subdivision of the said land.]
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Secondly, the proposed amendment seeks to delete the second defendant's counterclaim against the plaintiff.

Grounds Of Application

- c* The application is based on the following grounds:
1. to achieve the purpose of enabling the court to determine the real question in controversy between the plaintiff and the second defendant;
 2. to show the second defendant's actual position and rights in these proceedings; and
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3. to correct all defects in the second defendant's pleadings.

The plaintiff has no objection to the application.

Objection By First Defendant

- e* The first defendant through learned counsel En. S. Letchumanan objects to the application, principally on the ground that the application is *mala fide*, adding that the second defendant must have known that the second defendant has always been a party and not a witness, and that the nature of the proposed amendment supports the plaintiff's case and would prejudice the first defendant's defence.
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Response By Second Defendant

- g* Cik Liza Chan, learned counsel for the second defendant, in addition to elaborating on the grounds of the application, submitted in essence, that the first defendant's objection is without merits, scandalous, perverse and not valid.

Decision Of The Court

- h* The application calls for the interpretation of O. 20 r. 5(1) of the Rules of the High Court 1980, which, where relevant, provides as follows:

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... the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. a

The expression “at any stage of the proceedings” is certainly very wide, as has been demonstrated by the Federal Court in *Yoong Leok Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981]2 MLJ 21 which allowed an amendment even at the conclusion of the trial. b

The established principles governing the granting of leave to amend a party’s pleadings have been authoritatively enunciated by the Federal Court with unrivalled clarity in *Yamaha Motor Co. Ltd. v. Yamaha (M) Sdn. Bind. & Ors.* [1983] 1 CLJ 191 at p. 192, ([1983] CLJ (Rep) 428) (p. 430) as follows: c

the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (a) whether the application was *bona fide* (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. d

In the light of the objection raised for the first defendant which falls within a narrow compass ie, the second defendant has acted *mala fide* in making the application, I shall confine my judgment to this issue alone. e

The test of *bona fide* or *mala fide* may be illustrated through our decided cases. f

In *Yamaha Motor, supra*, the Federal Court granted leave to the appellant to amend the statement of claim after pleadings were closed. The amendment sought had the effect (a) that the appellant would be suing not only in their capacity as judgment creditors but also as majority shareholders of the first respondent company and (b) that fraud or unlawful conspiracy would be pleaded expressly in the creation of the 1977 debenture instead of mere lack of consideration and security for a non-existent debt. There was no question of any *mala fide* arising in that application. g

In *Taisho Company Sendirian Berhad v. Pan Global Equities Berhad & Anor* [1999] 1 CLJ 703, the appellant only made an application to amend four years after the commencement of the action and after failing in his h

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- a* appeal to the Court of Appeal to dismiss the respondents' defence of limitation. The Court of Appeal upheld the judge's refusal for leave to amend as on the facts, the application borders on lack of *bona fide*.

- b* An application to amend the defence which would convert the defence into an inconsistent defence of a different character, coupled with a long and inordinate delay of more than 10 years, without providing any explanation for the delay, was held by Tee Ah Sing J to be showing a lack of *bona fide* on the part of the defendant in *Angel Cake House Sdn Bhd & 7 Ors v. Bandaraya Development Berhad* [2001] 1 CLJ 746 HC.

- c* Similarly the ground of substituting one cause of action with another by way of amendment and also a delay of some 12 years in applying for amendment ie, from the filing of the suit on 7 March 1983 to the date of the application on 26 September 1995 without any explanation, was held by Clement Skinner JC (now J) to reflect the lack of *bona fide*: *Syarikat Ying Mui Sdn Bhd v. Muthusamy a/l Sellapan and Other Appeals* [1999] 4 CLJ 651 HC.

- e* In *Gurbachan Singh & 2 Ors v. Tetuan Muthu & Lee & Anor* [2001] 2 CLJ 173, the plaintiff's three-year delay in applying for amendment after a dissolution of injunction and removal of caveat was held by Su Geok Yiam JC as a belated manoeuvre designed to extricate themselves from the predicament and therefore casting serious doubts on the *bona fide* of the plaintiff in making the application.

- f* An application for amendment in order to delay the trial of a defamation action was held to border on the lack of *bona fides*: *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830 CA.

- g* Upon perusing the aforesaid decided cases, it is clear to me that at the end of the day, the grant or refusal of leave to amend is to be determined by reference to the exercise of judicial discretion by the court depending on the circumstances of each case: *Raphael Pura v. Insas Berhad & Anor* [2000] 4 CLJ 830, and this discretion must be exercised judicially: *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] MLJ 248.

- h* In my view, a party such as the second defendant should not be denied leave to amend her defence and counterclaim as alluded to above in order to make good the defects in the pleadings so as to enable the real issues between the parties to be tried and determined.

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It is trite law that at this stage, I am not the least concerned as to whether the proposed amendment would result in the success or otherwise of the second defendant in these proceedings. See *Yamaha Motor, supra*. a

The fact that the proposed amendment does not seem to fit into the scheme of things as spelt out in the first defendant's pleadings or does not appear to coincide with the defence of the first defendant does not demonstrate one way or the other the bona fide or *mala fide* of the second defendant, because the second defendant as a party is perfectly entitled to arrange or conduct her defence or pleading in the best way to serve her interest as the utmost priority, and indeed without any due regard whatsoever to the interest of any other party. The same principle would apply if the first defendant were to apply for leave to amend the first defendant's pleading. b
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On the issue of delay, since the commencement of the trial herein ie, from February 1997 to the date of this application on 10 August 2001, covering a period of some four years, the second defendant has in her affidavit and cross-examination thereof by learned counsel for the first defendant given a detailed account and explanation of her perception and impression of attending court as a witness as opposed to being a party or at least she was labouring under such a perception and impression. d

The second defendant's then learned counsel Mr. Maniam Raju of M/s Gunaretnam & Co., said to be acting for the second defendant, has also been subject to vigorous and incisive cross-examination. It is my specific finding that to some extent, there seems to be some communication gap between the second defendant and the said learned counsel pertaining to the facts of the case which form the basis of instructions to be included in the second defendant's pleadings. e
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The proposed amendments would in my view be more reflective of the instructions of the second defendant given to the present learned counsel, although, as I have stated above, the merits thereof would have to be established after a full trial. The above circumstances prevailing in the application have found no parallel in any of the decided cases referred to above. g

In my judgment, the delay has been reasonably explained by the second defendant specifically in respect of the perception and impression as to her capacity of a witness or a party, and also of the correct reflection of instructions to the new learned counsel. Hence I exercise my discretion in granting leave to amend the second defendant's pleading as in encl. (110). h

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- a* The prejudice, if any, to the first defendant may be compensated by an award of costs of RM350 to the first defendant, who together with the plaintiff are also given leave to amend the defence, if the first defendant and the plaintiff are inclined to do so, within 14 days after the service of the second defendant's amended defence on the first defendant and on the plaintiff respectively.
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